

In the Supreme Court of the United States

OCTOBER TERM 1987

**TERRENCE K. BRADY
PETITIONER**

V.

**H. FOSTER PETTIT, MAYOR
Lexington-Fayette Urban
County Government; DEAN
D. HUNTER, JR., Chief
Administrative Officer of
the Lexington-Fayette
Urban County Government;
SIDNEY C. KINKEAD, JR.,
Chairman; JULIAN A. JACKSON,
SR., WILFRED T. SEALS,
WALTER LEET, JR. and WANDA
V. CRANFILL, Members of
the Lexington-Fayette Urban
County Government Civil Service
Commission
RESPONDENTS**

**PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS**

BRIEF IN OPPOSITION TO PETITION

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**LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT**

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QUESTION PRESENTED

This case is an appeal of a determination by the Lexington-Fayette Urban County Government Civil Service Commission that Petitioner had disrupted the efficient operation of the government and compromised his ability to serve as personnel director by making certain statements to the press. The Civil Service Commission, the Fayette Circuit Court and the Kentucky Court of Appeals, in five separate opinions, applied the law as set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and determined that the Petitioner had not been disciplined in violation of his First Amendment right to free speech. Petitioner presents the question again to this Court.

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**CHARTER PROVISIONS OF THE
LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT**

Section 5.01 - *General*

All executive and administrative power of the merged government shall be vested in the Office of the Mayor . . . and such other departments, boards, commissions, officers and agencies as are created or authorized by this Charter. The Mayor shall be the Chief Executive of the Merged Government.

Section 5.10 - *Powers and Duties of the Chief
Administrative Officer, in
pertinent part*

The Chief Administrative Officer shall:

- (C) Subject to the authority of the Mayor as stated in this Charter supervise and control all departments . . .

COUNTERSTATEMENT OF THE CASE

Petitioner (hereinafter referred to as "Brady"), was hired as the first Personnel Director for the City of Lexington on August 1, 1973. In January, 1974, the City of Lexington and County of Fayette formally merged into a new single unit of government, the Lexington-Fayette Urban County Government. Brady remained Director of Personnel and Respondent Foster Pettit (hereinafter referred to as "Pettit" or "Mayor") was elected first mayor of the new government. After merger, administration of the urban county government was very hectic as all divisions of the old city government suddenly became responsible for county-wide operations.

In September, 1974, Brady made a series of statements to a reporter for a Lexington newspaper. He chose the time of his first release very carefully to coincide with the Mayor's absence from Lexington. He did not warn the Mayor or any other government official that the statements were going to appear. Brady thought the Mayor would be "surprised" when the articles appeared and also suspected that his statements would not help the Mayor. After his public announcements, Brady did not bring evidence to support his charges to any other forum in the Urban County Government nor did he proceed in any manner against the Mayor or the other officials he accused of wrongdoing.

Statements made by Brady included accusations that the Mayor was attempting to use the personnel office for political appointments by bending civil service rules; that the Mayor was attempting to bend civil service procedures for the Director of Planning and, perhaps, had a particular person in mind for the job; that the acting Chief Administrative Officer was a "token" who was being used by the Mayor; that supervisors were failing, either deliberately or negligently, to post job openings; that the Mayor and Urban County Council were attempting to hamstring the personnel office by not providing sufficient help; that the promotions in the police and fire department were handled internally and, in the Fire Department, there were accusations of favoritism; and that he no longer owed his allegiance to his employer. Later statements made by Brady reiterated and expanded these statements and diversified the administrators at whom they were directed. Mayor Pettit filed charges against Brady alleging that Brady's statements were false, that he failed to raise his complaints before appropriate Urban County Government bodies and that the statements undermined public faith in the personnel system, caused a breach between the Director of Personnel and other executives, and, therefore, constituted misconduct calculated to disrupt the orderly operation of the government.

An extensive hearing was held before the Lexington-Fayette Urban County Civil Service Com-

mission. The hearing transcript is nine hefty volumes. The evidence presented supports the Commission's finding that Brady undermined the personnel system and that he caused a breach with other directors and that his conduct showed a reckless disregard for the consequences of his actions. (Appendix to the Petition for Writ of Certiorari [herein referred to as "App."], pp. 27a and 30a.)

Mayor Pettit's testimony established that he did not become involved in any civil service appointments except the search for the Director of Planning, which he thought might be reopened in order to attract better qualified candidates. The Urban County Government's Law Department later determined that Pettit's request to reopen this search was not in violation of the civil service statutes. The other incidents described by Brady in support of his allegations that Pettit was bending civil service rules all involved positions not subject to civil service or were made up after the fact. Brady also testified that he received similar employment recommendations from Urban County Councilmembers, but that these recommendations were not "pressure", a further indication of the selectivity of Brady's interpretation of events.

Similarly, the record is replete with testimony from other directors and councilmembers supporting the Commission's finding that Brady has caused a breach in his relationship with other government employees. Pettit testified that Brady has destroyed his credibility

with the Mayor. Other employees testified that Brady's outbursts had affected their relationship with him and made them afraid that innocent statements they made might be subject to the same sort of misrepresentation. These and other individuals testified that Brady never raised the matter before or after his public statements. Brady gave no thought to the effect of his statements except that they would surprise and hurt the Mayor and did not consult with anyone before the statements except his wife. Additionally, he refused the present his charges to the Civil Service Employees Association even though he wanted that group's financial and moral support.

That a close working relationship existed between the Mayor and Brady is obvious. The Mayor is the appointing authority for all positions in the civil service. The Charter of the Merged Government places both the Mayor and the Chief Administrative Officer (CAO) in direct control of the Division of Personnel. This supervisory scheme is explicit, as shown by Charter Sections 5.01, 5.04 and 5.10(c). The Director of Personnel was under the direct supervision of the Mayor and the CAO. The CAO, whom Brady also criticized, was in an acting capacity in the new government. There was not time between January and September of 1974 for the full administrative development of the position that Brady's strained reading of the Charter would seem to require. Brady's reliance on the Charter sections ignores the reality of a newly formed fledgling

government. Brady's statements were directed at the people with whom he had to work and to consult and to whom he had to report his activities.

Procedurally, it must be noted that this case has been in the courts since 1974. The decision of the Civil Service Commission has been reviewed twice by the circuit court, twice by the Kentucky Court of Appeals and once by the Kentucky Supreme Court. Between 1979, the year *Brady v. Pettit*, 586 S.W.2d 29 (Ky., 1979) was decided by the Supreme Court of Kentucky and May 10, 1984, the date Brady filed a motion for summary judgment, no action was taken in the circuit court. The "procedural skirmishes" to which Brady refers at p. 13 of his Petition stemmed from his filing of a suit in United States District, Eastern District of Kentucky (83-109) alleging that his dismissal violated his First Amendment rights and that he was entitled to relief under 42 U.S.C. §1983. The federal case was dismissed by the district court because the applicable statute of limitations had long run, a decision upheld by the Sixth Circuit Court of Appeals (84-598). This Court denied Brady's Petition for Writ of Certiorari to the Sixth Circuit in October, 1986. (85-63).

After his federal suit failed, Brady attempted, in 1986, to append his §1983 cause of action to the pending administrative review. Respondents moved to dismiss the amended complaint, and the circuit court, ruling on all outstanding issues, prepared an extremely detailed, thoughtful and well reasoned opinion upholding the action of the Civil Service Commission.

Petitioner's discussion of the circuit court's opinion is erroneous in several areas. First, as to the attempted addition of the §1983 action in the amended complaint, the circuit court held that because of the death or disassociation of some of the parties and witnesses involved in the case, time alone would seem to be sufficient to dismiss the amendment. In addition, however, the court held that Brady's amendment would proceed upon an entirely different cause of action, one requiring new proceedings, including a jury trial, and relief. The evidence necessary to rebut Brady's §1983 allegations, the court held, might be substantially different from and, therefore, not addressed in testimony given in 1974. Noting that an independent §1983 claim would be barred, the court exercised its discretionary power and dismissed the amended complaint. See, App., pp. 9a-10a.

Secondly, in assessing the First Amendment issues raised by Brady, the circuit court very clearly set out its understanding of the burden imposed on courts by *Pickering v. Board of Education*, 391 U.S. 563 (1968), as expanded in *Connick v. Meyers*, 461 U.S. 138 (1983). The circuit court used the two cases as guidelines and determined:

1. Brady leveled charges at many department supervisors with whom he was required to maintain a close working relationship. App., p. 17a.

2. "Considering the nature of his allegations and the time, manner and place of making them, it is clear from the evidence that Brady no longer held the confidence and respect of management people in those departments of government which his office served on a daily basis." App., p. 18a.
3. Brady's statements were not so much true or false but were opinion and conclusion. "It appears from the evidence that Brady acted much like Chicken Little of nursery story fame who saw an acorn fall and shouted 'The sky is falling'! Chicken Little, like Brady, jumped to that conclusion all by himself and without regard to the consternation such proclamation would bring to others. The court must find from the evidence that while Brady may not have actually known that the conclusions and opinions expressed by him were false, his public statements were made recklessly without regard to whether they were false or not because he did not make any real investigation or seek any explanation, relying only on the inferences that were formed in his own mind." App., pp. 19a-20a.

The court did make a general disclaimer that its opinion should not be read to require that an employee exhaust administrative procedures before speaking out. That disclaimer, however, was followed by finding that an employee in Brady's position has a duty to consider the consequences of public speech before exercising his right to speak out. App., p. 20a. This finding is exactly that of the Civil Service Commission which held:

It is the opinion of this Commission that a reasonable man under the same and similar circumstances would not so have conducted himself and that the handling of the entire matter by Terrence K. Brady as shown by the evidence herein is conduct that has unnecessarily and improperly undermined public faith in the personnel system of government, caused a breach or disruption of communications between the director of personnel and other persons in the Executive Branch of government. We are further of the opinion that although without malice but with a reckless disregard for the consequences said conduct was calculated to disrupt the orderly and harmonious operation of the government and its personnel system. App., p. 27a.

Finally, not until this Petition, has Brady attacked the sufficiency of the findings before the Civil Service Commission. Nowhere in the two opinions of the circuit court, the two opinions of the Court of Appeals of Kentucky and one opinion of the Supreme Court of Kentucky is there any mention of this issue.

REASONS FOR NOT GRANTING THE PETITION

The Petition for Writ of Certiorari should be denied because, as explained below, the five issues set out by Brady are based upon assumptions and facts not supported by the record. As explained below, the findings of the Civil Service Commission and the circuit court exactly followed the dictates of *Pickering* and *Connick* and support the dismissal of Brady.

ARGUMENT

In his first issue, Brady invites the Court to set down a rule of law that a public employee cannot be sanctioned for making true statements and publicly criticizing his supervisor's official conduct. The facts of this case do not present that issue for decision. The Civil Service Commission specifically refused to rule on the truth or falsity of Brady's statements but held instead that his statements disrupted the operation of the government. The circuit court, the last body to review the record, determined that Brady's statements were substantially false. In order for the Court to rule as Brady requests, it would be necessary for the Court to send this case back to the Civil Service Commission for a determination of whether or not Brady's statements were true. Alternatively, the Court would have to overrule the circuit court's determination that the statements were substantially false. Neither of these courses of action is necessary. Since the facts do not present the issue, this Court should not reform the case for Petitioner.

In his second issue, Brady asks the Court to require that specific findings of dire employment related consequences be made before an employee can be dismissed for public statements. Brady has failed to preserve this issue. The Civil Service Commission found that Brady's conduct "was calculated to disrupt the orderly and harmonious operation of the government and its personnel system." App., p. 27a. The

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sufficiency of that finding was never challenged and this Court should refuse to hear arguments on issues raised for the first time in its chambers.

Alternatively, Brady's reliance on *Rankin v. McPherson*, 483 U.S. _____, 107 S.Ct. 2891 (1987) for the proposition that these specific findings are necessary, is misplaced because the case sets out standards very much like those used by the Civil Service Commission to determine that Brady had disrupted the operation of the government. Although McPherson's statements were protected, the importance of the setting within which the statements were made was emphasized throughout the decision. *Rankin* at 2899. The Civil Service Commission did not operate in a vacuum and it assessed the damage done by Brady within the milieu of the newly formed government. Because the issue was not preserved, there is no need for the Court to expand its decision in *Rankin*.

Because the Civil Service Commission did not find that Brady's statements were substantially true, there is little merit in Brady's third invitation to this Court to extend the law of defamation to public employee cases. The Commission determined that in two instances activities occurred which would constitute some explanation for Brady's allegations regarding civil service rules. App., pp. 29a-30a. The Commission, however, specifically did not attempt to find the truth or falsity of each allegation. The Commission accepted the existence of some inferences which could lend merit

to some of Mr. Brady's accusations, but determined that Brady had disrupted the government and lost his ability to continue to effectively and efficiently function as the Director of Personnel. Nowhere in the opinion does the Commission find Brady's statements substantially true. The issue in this case, additionally, is not whether or not the statements of Brady should be treated in the same manner as defamatory statements by this Court, but whether a public employer may discipline a public employee. *Pickering* and *Connick* do not require this additional step.

For his fourth issue, Brady requests that this Court rule that a failure to investigate or consider the consequences of statements is insufficient conduct to support discharge of a public employee for making public statements. This Court has already held in *Pickering* and *Connick* that there are instances in which a public employer may discipline a public employee because of his public statements. As noted in the circuit court's opinion, the relationship between the criticized employer or administrator and the employee, the necessity for a close working relationship, the necessity of the efficient operation of the public's work and other issues support disciplinary action. App., p. 17a. A rule such as that proposed by Brady would insulate from punitive action any employee under any circumstances. In fact, it would encourage employees to make baseless statements which would, as in this case, undermine the public's faith in the operation of government and disrupt the internal operations of the government.

Finally, as the fifth issue, Brady accuses the circuit court of misconstruing state law to prevent Brady's assertion of his 42 U.S.C. §1983 rights. This is a state law question, one which was not ruled on by the Kentucky Court of Appeals or the Supreme Court. The case cited by Brady, *Perkins v. Read*, Ky., 616 S.W.2d 495 (1981), is a personal injury case in which the plaintiff named herself individually as well as in her capacity of executrix of her husband's estate. She sought relief limited to a claim of damages for her husband's wrongful death and destruction of their vehicle. Over three years later, she sought leave to file an amended complaint asserting a claim for damages arising from personal injuries she sustained in the collision. The Kentucky court allowed the amendment after it had been dismissed by a lower court but specifically held that the defendants would not be unduly prejudiced by allowing the complaint to be amended. *Perkins v. Read*, 616 S.W.2d at 496. The circuit court in this case determined that the defendants would be prejudiced by changing the nature of the case before the court from an administrative appeal to a §1983 action. This decision was well within the discretion of the circuit court.

Martinez v. California, 444 U.S. 227 (1980), the case cited by Brady for the proposition that state law cannot defeat federal rights, is not on point. *Martinez* arose as a challenge to a grant of immunity which prevented the plaintiff from suing parole officers who had released a prisoner who killed his daughter.

This Court did not reach the immunity question presented by the plaintiff, but, rather, determined that the plaintiff's decedent had not been deprived of a property interest by action of the state. This case presents the same issue as *Martinez* because the circuit court's dismissal of the amended complaint, whether or not erroneous, followed a determination that Brady's First Amendment rights had not been violated. There is no need for this Court to redecide *Martinez*.

CONCLUSION

The Petition for Writ of Certiorari should not be granted because the case simply does not present important federal questions for decision. The circuit court decision contains a correct application of federal law and should not be reviewed.

Respectfully submitted,

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